Service Date: July 21, 1993

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER Of the Application of L & B Busing, Inc., Florence, Montana for a Class B Montana Intrastate Certificate of Public Convenience and Necessity. | ) ) ) ) ) | TRANSPORTATION DIVISION<br><br>DOCKET NO. T-9865<br><br>ORDER NO. 6140a |

**ORDER ON RECONSIDERATION**

INTRODUCTION

1. On December 16, 1992 the Montana Public Service Commission (Commission) issued Final Order No. 6140 granting L & B Busing, Inc. (L&B) certain Class B charter bus authority. On January 11, 1993 Protestant Beach Transportation Company (Beach) filed a Motion for Reconsideration, brief and request for oral argument.[1] The Commission heard oral argument on the Motion on March 1, 1993, after which it took the matter under consider-

[1] On December 21, 1992 the Commission granted Beach an extension of time to file for reconsideration. On January 25, 1993 the Commission granted Beach's request for oral argument and waived ARM 38.2.4806(5), the rule that deems a motion for reconsideration denied if not acted on in ten days.

ation. For the reasons discussed below the Commission grants Beach's Motion and reverses its decision in Order No. 6140.

2. Beach makes the following arguments to support its contention that the Commission should reconsider Order No. 6140 and deny L&B's application: 1) L&B did not demonstrate financial fitness; 2) L&B has operated illegally; 3) a desire to smoke on the bus and travel on gravel roads does not support a finding of public need; 4) price differential cannot be considered as a basis to support public need; and 5) a grant of broad authority to L&B will cause hardship and economic loss for Beach. In addition, Beach argues that the grant to L&B "effectively deregulates the bus transportation business in Montana without legislative authority." Beach's brief in support of its Motion for Reconsideration (brief), p. 3.

## DISCUSSION

### FITNESS

3. Beach argues that L&B did not demonstrate financial fitness to perform the proposed transportation. On reconsideration, the Commission agrees. The Commission has never estab-

lished a precise test for financial fitness, but clearly some basic showing must be made that Applicant has the financial resources to ensure that the proposed service will be "permanent and continuous throughout 12 months of the year." See, ? 69-12-323(2)(a), MCA. Such a showing would include: 1) a detailed description of the business organization that will provide the proposed service and its relationship, if any, with other businesses, 2) financial statements, and 3) an approved line of credit for future operations. L&B did not carefully address these or other elements of financial fitness at the hearing. The Commission does not conclude that L&B is financially unfit for additional authority, merely that such fitness has not been demonstrated on this record. L&B has been operating for several years under its existing authority. But the Commission will not presume financial fitness based on past operations, especially when L&B has applied for authority in a major new market that could place increased demands on L&B's business.

4. In addition to challenging L&B's financial fitness Beach contends that the application should be denied because L&B has performed illegal operations. When considering fitness the fact of a past illegal move is not dispositive. There are, for example, both good and bad faith illegal operations. A good

faith illegal move is one conducted in ignorance of the need for authority or upon misunderstanding of the scope of authority. A bad faith illegal move is one conducted with the knowledge that it is illegal. Of the two the Commission considers the latter far more serious and the one most damaging to a finding of carrier fitness. However, even knowing disregard of the motor carrier laws does not preclude a finding of fitness. The Commission has discussed this point as follows:

> [A]fter being informed in October of 1984 that they needed authority, the Whitts continued to operate illegally. Such bad faith illegal operation is a very serious matter and has been found to justify a finding of unfitness without further consideration of the applicant's case. See e.g., H.R. Ritter Trucking Co., Extension, 111 M.C.C. 771 (1970); and Antietam Transit Company, Inc., Common Carrier Application, 84 M.C.C. 459 (1961). This Commission expressed its opinion of bad faith illegal operation in the Application of Power Fuels, Inc., Docket No. T-4986, Order No. 3038, when it wrote that "evidence [of knowledgeable illegal operations] casts a serious doubt as to whether Applicant is fit to provide the proposed service should this application be granted."
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> Despite our strong condemnation of bad faith illegal operations, this Commission does not take the inflexible position that such operations are automatic grounds for denial of an application. Rather, we consider past willful misconduct as one element in assessing an applicant's present and future fitness. This position is in accord with that taken by the I.C.C. See Armored Carrier

> Corporation v. United States, 260 F.Supp. 612, 615 (1966). As noted above, in Ritter and Antietam the I.C.C. has found willful illegality a bar to a grant of authority. But in other cases, with different facts, it has found the reverse. See, e.g. B.D.C. Corporation, Extension-Five Counties, 99 M.C.C. 126 (1965); and Howard Sober, Inc., Extension-Various States, 83 M.C.C. 361 (1960). We find that when determining the fitness of an applicant who has engaged in willful illegality, two things need be considered: 1) the severity and circumstances of the illegal conduct and 2) the public interest in the prospective service. In both B.D.C. Corporation and Howard Sober, supra, the I.C.C. found the willful illegalities minor compared with the public interest in the anticipated service. Therefore, it ruled that sound economic regulation justified findings of fitness and the granting of the applications. By contrast, in our order in Power Fuels, we found that a sophisticated carrier, knowledgeable of public service regulations, willfully violated those regulations. To overcome such misconduct a clear, if not overwhelming, case for public convenience and necessity would have to be made. No such case was made in Power Fuels and the application was denied.

In the Matter of the Application of Dave D. and Jannell A. Whitt for a Class B Certificate of Public Convenience and Necessity, Docket No. T-8453, Order No. 5638a, pp. 13-15 (1986).

5. The nature and extent of L&B's illegal operations are not clear from this record. L&B did make at least one illegal move for which it was cited and paid a fine. In the Matter of

L&B Busing..., Docket No. T-9933, Order No. 6165 (1992). L&B claims to have had a good faith misunderstanding of the scope of its authority which may have caused some illegal movements. (TR p. 52.) Beach claims L&B made numerous bad faith illegal movements. The Commission finds the record less clear than Beach does on this point, but acknowledges that the record supports a suspicion that L&B conducted bad faith illegal operations. On the other hand, it appears from the record that L&B has refused movements outside the scope of its authority. (TR pp. 15, 19, 70-74.)

6. On balance, L&B's illegal operations as demonstrated on this record are probably not sufficient to support a finding that L&B is an unfit carrier, deserving of having its existing authority revoked and this application denied. However, in order to overcome its demonstrated illegal operations and the serious questions surrounding other of its operations, L&B would have to make a very strong showing of fitness in other areas along with a showing of public need. L&B's failure to demonstrate financial fitness has already been discussed. As will be discussed below, the Commission finds that L&B did make a showing of public need. But given the questions surrounding L&B's fitness, the Commission concludes that it is in the public interest to give

existing carriers the opportunity to meet that need.

NEED

7. The Commission affirms its discussion of public need in Order No. 6140. In addition, the Commission responds to Beach's objections on reconsideration as follows.

8. Beach argues that the evidence of need is "anecdotal." Presumably, Beach means that only a few witnesses testified that, on occasion, they have had a particular need. This is not a serious objection to the evidence. All evidence in proceedings of this kind is anecdotal. Need is established by shipper witnesses expressing instances of shipper need. Applicants do not have to conduct surveys or present a certain percentage of potential shippers in order to establish need. It is possible that need can be established by a single shipper witness.

9. Beach also argues that the Commission's finding (at paragraph 22, Order No. 6140) that there is public need for buses that allow smoking and travelling on gravel roads is a "red herring." By "red herring" Beach apparently means that this finding was only meant to divert attention from the Commission's real reason for granting the authority: the price differential. This was not the Commission's intent. The Commission discussed

the evidence of need for buses that allow smoking and travel on gravel roads not to throw out a red herring, but to simply acknowledge some of the need presented. Whether this need would have been sufficient, absent consideration of carrier fitness, to support a grant of authority, was not and is not before the Commission. The evidence for smoking and travel on gravel roads, when combined with other evidence, led the Commission to conclude that this record presents a "character of service" issue of first impression in Montana. Evidence on smoking and gravel roads should neither be overemphasized (which the Commission did not do in Order No. 6140), nor dismissed (as Beach suggests on reconsideration). It is simply part of the record that, in its totality, supports a conclusion of public need.

10. Beach asserts that the real reason the Commission granted L&B authority was price differential, and argues that price cannot, or at least should not, be used as a basis to support public need. It is not correct that the price differential was the only reason the Commission granted L&B's application. It is correct that the price differential, as a reflection of the different "character of service" provided by the two bus companies, was a very significant reason for the Commission's decision. The Commission stands by its discussion of the "char-

acter of service" issue at paragraphs 24-26 of Order No. 6140.

11. While the concept of "character of service" has not been used before by this Commission, it is not new to motor carrier regulation. The Commission is confident of its independent determination of need based on the particular facts of this record. However, given Beach's vigorous objections to the Commission's analysis, it is interesting to note the following Interstate Commerce Commission (ICC) cases.

12. In Roy J.S. Longneil Common Carrier Application, 23 M.C.C. 176 (1940), an applicant who provided a special character of service for a Girl Scout organization was granted authority. The ICC refused to restrict the authority to the Girl Scout organization, stating:

> In addition to the transportation of Girl Scouts, applicant is in a position to carry other groups that may require his service.... it is in the public interest to have available a convenient and reliable charter service for use of any such groups that may require it.

Id., at 178 (emphasis added).

13. In Shepherd Bus Service, Inc., Contract Carrier Application, 81 M.C.C. 47 (1959) an applicant who provided special transportation for certain religious organizations of persons 21 years old and younger was granted authority. Over the objections

of existing carriers the ICC said, "We ... believe, aside from the matter of rates, that applicant is highly qualified to serve these organizations, and that it proposes a personalized type of service which the existing common carriers are not in a position to provide." Id. at 51 (emphasis added).

14. In Gurnie L. Blunt Common Carrier Application, 92 M.C.C. 306 (1963), an application for authority was denied, but on reconsideration the applicant asserted "that protestant's service does not meet the reasonable transportation requirements of the affected public, that witnesses who support the application are unable to afford the high quality service performed by protestant ...." Id. at 306. The record in Gurnie indicated that

> [N]umerous individuals and representatives of religious organizations, schools, athletic teams, and social groups from points in the involved origin territory support the application. Users from the involved origin area, which is largely rural, are predominantly in a low-income bracket, consider protestant's charges prohibitive, and accordingly, with a few exceptions, have not utilized protestant's service.

Id. at 307-308. The ICC's response on reconsideration is worth quoting in its entirety.

> In the prior report it was concluded that in the absence of a showing that existing ser-

> vice is inadequate, the application should be denied. We are now persuaded, however, that the service of protestant is not responsive to the particular needs of that segment of the user public represented herein. In so stating, we are aware that the question of cost of service is not one which may properly be considered in an application for a certificate of public convenience and necessity, unless it can be established that a carrier's charges are so high as to constitute an embargo. We do not believe that the record affords a basis for such a finding herein. With respect to service, however, it is clear that protestant does not provide that type of personalized service for both small and large groups which the public, because of its largely rural location, requires. Although protestant maintains solicitation personnel in the general area in question, it appears that the numerous groups and individuals who appeared in support of the application have not been solicited. Applicant has provided a flexible, highly satisfactory service, and users desire its continuance. While protestant questions the propriety of applicant's rates, it has an appropriate forum for its contention under other sections of the act. In our judgment, the granting of this application to the extent recommended by the examiner will have little, if any, adverse effect on protestant's operations. We conclude that the application should be granted.

Id. at 308-309 (footnote omitted, emphasis added). Except for the ICC's conclusion on whether the protestant's charges constitute an embargo, this language in large measure captures the Commission's response to the instant record.

15. In American Buslines, Inc., Extension - Long Island,

N.Y., 99 M.C.C. 506 (1965), an applicant with buses more deluxe than those of protestant carriers sought additional authority. The ICC denied the application but in the process provided an analysis of PC&N for passenger carriers that is relevant to this case:

> The examiner refused to consider deluxe features of applicant's equipment and service as a legitimate element of public convenience and necessity, concluding that the controlling question is whether or not additional transportation is needed. Insofar as his conclusions would seem to infer that the quality of charter bus equipment is not a proper factor in determining the adequacy of existing charter service, we are unable to agree. Clearly, motor-bus passengers, particularly those utilizing charter service, are interested in and entitled to more than mere expeditious transportation from one point to another. The phrase "convenience and necessity" implies more than mere adequacy or availability of agencies by which a traveler can be conveyed from one point to another, without regard to special and distinguishing characteristics of the service afforded. All American Bus Lines, Inc., Common Carrier Application, 18 M.C.C. 755, at page 776. To find that such characteristics are without probative value in applications such as the one before us would have a stifling effect upon carrier initiative and would greatly reduce incentive for development of new and improved types of service.

Id. at 512. The instant case presents facts exactly the reverse of American Buslines: L&B has buses less deluxe than those of

the protestant. The analysis, however, is the same. "[S]pecial and distinguishing characteristics of ... service" may be considered in a determination of public need. See also, City Transit Company of High Point, Inc., Common Carrier Application, 113 M.C.C. 471, 475-76 (1971).

All of these cases support the Commission's conclusion in Order No. 6140 that public need was demonstrated. The ICC refused to find that the rate differentials created an embargo, but it nevertheless recognized that character of service may support a grant of authority. The Commission did find "that Beach's rates do amount to an embargo on charter bus transportation for a significant segment of the market." Order No. 6140, p. 13. But even if it had not so found, it could still have granted L&B's application based on character of service.[2]

16. Beach makes several other arguments on reconsideration. First, it implies that L&B's rates may be "artificially low." This is not a proper proceeding for determining the reasonableness of L&B's rates. If Beach believes L&B's rates are predatory or not compensatory it can file a complaint with the Commission

[2] In In the Matter of Beach Transportation Company ..., Order No. 6141, Docket No. T-9900 (December 23, 1992) the Commission found the record supported public need based on character of service and granted Beach additional

pursuant to ? 69-12-503(2), MCA, or other relevant section.

17. Second, Beach states that it is willing to meet any legitimate need that the Commission sees from the record and argues that it should be allowed to do so in lieu of granting authority to L&B. Beach also alleges that a grant of authority to L&B would "create severe hardship and economic loss" to Beach. Brief at 31. The record does not support Beach's contention that a grant of authority to L&B would cause severe economic hardship to Beach. The Commission finds, however, that L&B's questionable fitness for new authority, combined with Beach's exemplary record of service to most customer markets in the Missoula area, supports the conclusion that Beach should be allowed to meet the legitimate needs expressed in this record. The Commission finds that, at this time, the public interest is better served by encouraging existing carriers to meet the needs expressed, than by authorizing L&B to compete in the Missoula market.

18. Finally, Beach argues that granting authority to L&B effectively deregulates the charter bus business without legislative authority. This is not accurate. Order No. 6140 does not deviate from the general principle of motor carrier regulation:

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authority on that basis.

public need must be demonstrated before new operating authority will be granted. However, the Commission does declare by Order No. 6140 and by this Order that public need for charter bus service will be determined by the public, not by existing carriers. See In the Matter of Early Bird Enterprises, Inc., Docket No. T-9651, Order No. 6069.

19. In this Order the Commission does not reverse its conclusion that this record supports a finding of public need for a different character of charter bus service originating in Missoula County. The Commission does reverse its conclusion that L&B made a sufficient showing of carrier fitness, and it further concludes that it is in the public interest to give existing carriers the opportunity to meet the needs expressed in this record. Whether, and how, existing carriers reach out to meet the needs expressed is a decision for those carriers. But if existing carriers ignore legitimate needs, requests for entry into the charter bus business by fit applicants will be granted.

## CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. The application does propose an operation that will serve a useful public purpose responsive to a public demand.

4. The foregoing public demand can satisfactorily be met by existing carriers and authorities.

5. On this record the Applicant is not a fit carrier for additional authority.

6. After hearing upon the application and after giving reasonable consideration to the fitness of the Applicant for additional authority, the Commission concludes from the evidence that public convenience and necessity warrants giving existing carriers the opportunity to meet the public need described in this record. Section 69-12-323(2), MCA.

## ORDER

NOW THEREFORE IT IS ORDERED that the Motion of Beach Transportation for reconsideration of Order No. 6140 is Granted. The application of L&B Busing, Inc., for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of persons in charter bus service between all points and places in Montana, with the limitation that transportation must

originate in and return to the counties of Missoula and Granite Counties is Denied. L&B may perform charter bus trips arranged pursuant to its authority granted in Order No. 6140. But L&B may not arrange any further transportation pursuant to Order No. 6140 following the receipt of this Order. L&B shall inform the Commission within ten days of the receipt of this Order of the dates and destinations of all trips arranged pursuant to authority granted in Order No. 6140.

Done and Dated this 13th day of July, 1993 by a vote of 2-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____

BOB ROWE, Vice Chairman
(Voting to Dissent)

_____

DAVE FISHER, Commissioner

_____

DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter. Judicial review may be obtained by filing a petition for review within thirty (30) days of the service of this order. Section 2-4-702. MCA